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No. 881

IN THE

Supreme Court of the United States

OCTOBER TERM 1959

No._____

AMERICAN LEGION POST NO. 51, *Appellant*

v.

COMMONWEALTH OF PENNSYLVANIA, *Appellee*

On appeal from the
SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

Appellant appeals from the final judgment of the Supreme Court of Pennsylvania, entered November 24, 1959, rehearing denied December 17, 1959, affirming the judgment of the Superior Court of Pennsylvania which affirmed the order of the Court of Quarter Sessions of Fayette County, Pennsylvania, decreeing forfeiture and destruction of appellants' machines, and submits this Statement to show that the United States Supreme Court has jurisdiction of the appeal and that a substantial question is presented.

OPINIONS BELOW

The decision of the Supreme Court of Pennsylvania is reported at 397 Pa. 430, A. 2d 107; which affirmed, per curiam, on the opinion of the Superior Court of Pennsylvania, reported at 188 Pa. Super. 480, 149 A. 2d 483.* The opinion of the Court of Quarter Sessions of Fayette County, Pennsylvania, is reported at 16 Pa. D. & C. 2d 363.

JURISDICTION

This is an in rem proceeding for forfeiture and destruction of multiple coin pinball machines pursuant to Pennsylvania Act of March 31, 1860, P.L. 382, Section 60, 18 P.S. Section 1445. The order of the Pennsylvania Supreme Court was entered on November 24, 1959, and petition for rehearing was denied on December 17, 1959. The notice of appeal was filed in that Court on February 23, 1960.

The jurisdiction of the Supreme Court to hear this appeal rests upon 28 U.S.C. Section 1257(2).

STATUTES INVOLVED

Act of 1860, March 31, P.L. 382, section 60, 18 P.S. Section 1445.

> "It shall and may be lawful for any sheriff, constable or other officer of justice, with or without warrant, to seize upon, secure and

*Reported as In re: Return of Julius A. Trombetta, Sergeant, Pennsylvania State Police

remove any device or machine of any kind character or description whatsoever, used and employed for the purpose of unlawful gaming as aforesaid, and to arrest, with or without warrant, any person setting up the same. And it shall be the duty of such sheriff, constable or other officer to make return, in writing, to the next court of quarter sessions of the proper county, setting forth the nature and description of the device or machine so seized upon, and the time, place and circumstances under which such seizure was made; and the said court, upon hearing the parties, if they should appear, if satisfied that such device or machine was employed and used for the purpose of unlawful gaming as aforesaid, shall adjudge the same forfeited, and order it to be publicly destroyed, and at the same time order such reasonable costs and charges to the seizing officer as they shall deem adequate and just, to be paid by the owner or possessor of such device or machine, or in case of his default, or in case he cannot be found, to be paid as costs are now by law paid upon indictments; and such adjudication shall be conclusive evidence to establish the legality of such seizure, in any court of this commonwealth, in any cause in which the question of its legality shall arise; and in any case in which a decree of forfeiture shall not be pronounced, if said court shall, upon the evidence, be satisfied that there was probable cause for the seizure, they shall certify the same, which certificate shall be a bar to any action brought against the officer for or on account of such seizure, in those cases in which

the said officer returns, or offers to return such device or machine; and in all cases shall prevent a recovery in damages, for any sum beyond the real value of the device or machine seized."

QUESTIONS PRESENTED

1. Is the Pennsylvania Statute, act of March 31, 1860, P.L. 382, Section 60, 18 P.S. Section 1445, when construed to authorize seizure, forfeiture any destruction of Appellant's property because such property might or could be used for unlawful gambling purposes, even though it was not, repugnant to the due process clause of the Fourteenth Amendment of the United States Constitution?

2. Where the said Statute has been previously construed to apply to property actually used or employed for unlawful gambling purposes, but is now for the first time construed to apply to property which might or could be used for unlawful gambling purposes, is not such retroactive application to appellant's property repugnant to the due process clause of the Fourteenth Amendment to the United States Constitution?

3. Is it not inconsistent with the due process clause of the Fourteenth Amendment to the United States Constitution for appellant's property to be seized under color of state law, and ordered forfeited and destroyed where such property was not

shown to be used or employed for unlawful gambling purposes, but upon the conjecture that it might or could be so used or employed?

4. Is it not inconsistent with the due process clause of the Fourteenth Amendment to the United States Constitution for the appellant's property to be seized under color of state law, and ordered forfeited and destroyed without regard to the use and employment of such property?

STATEMENT OF THE CASE

On June 20, 1957, the Pennsylvania State Police seized various multiple coin pinball machines owned by applicant. A return was made to the Court of Quarter Sessions of Fayette County, Pennsylvania, and petition filed seeking their destruction as gambling devices per se. A rule was issued on June 26, 1957, returnable July 8, 1957, and on July 8, 1957, answer was filed by appellant. Hearings were held commencing July 17, 1957. These proceedings were in rem under the Act of March 31, 1860, P.L. 382, Section 60, 18 P.S. Section 1445.

The machines involved are of a type whereby a coin or coins may be inserted to obtain a number of steel balls. The steel balls are propelled by use of a calibrated plunger onto a horizontal playing field through a maze of pins and fall into holes scattered on the playing field or into a slot at the

bottom of the playing field. Lights are illuminated on a vertical board at the head of the playing field when a ball comes to rest in a hole. Scores are registered on the vertical board, and are determined by the number of balls deposited in the holes and the position of the holes filled by the balls. Certain scores entitle the player to free games. By depositing additional coins, a player may obtain an additional ball, and he may also change his opportunities to secure higher scores and free games. The machines are equipped with a counter that shows the number of free games earned, and a means, called a "knock-down" button, to cancel the free games shown but left unused by players in order to clear the machines for subsequent players. Inside the machines are meters that register the total number of games played (free and paid), and the number of free games cancelled.

There was no evidence offered by the Commonwealth to prove that actual gambling took place on or in connection with these machines, or that money or merchandise, or anything of value, had ever been paid to winners of free games. So far as the record shows, players received only the right to play free additional games, and this is not unlawful gambling. As a matter of fact, the Commonwealth's petition alleged only that the machines involved were gambling devices *per se*. The Commonwealth candidly stated that it desired a determination as to whether the machines are gambling devices *per se*.

The Superior Court of Pennsylvania said that the machines were gambling devices *per se* because it felt a player would not leave free games; hence, the "knock-down" button "obviously" would be used to cancel free games for which the player was compensated. It also said the machines were gambling devices *per se* because it felt that there can be no reward in terms of amusement from the mere insertion of coins into an unresponsive machine. The Court said it could not understand, if free games are all that can be won, why there should be a difference in price charged for playing the machine.

The Supreme Court of Pennsylvania affirmed on the opinion of the Superior Court, two Justices dissenting. The dissenting justices pointed out that the fact that the machines might or could be used for gambling did not make them gambling devices *per se* subject to forfeiture and destruction.

The action of the Supreme Court of Pennsylvania represented the first determination that an item of property could be confiscated under the Pennsylvania laws without a showing that it was in fact used or employed for gambling. It is the first determination in Pennsylvania that such confiscation is justified because the property might or could be used for gambling, even though the evidence showed that it was not. Accordingly, appellant petitioned the Court for reargument asserting that appellant was deprived of due process under

the Constitution of the United States, and that the action of the Supreme Court in forfeiting the machines here involved and directing their destruction violates the Fourteenth Amendment to the Constitution of the United States. This peititon was denied following the answer of the Commonwealth, in which it was averred that the Petition for Reargument presented no new matter not previously considered by the trial court, the Superior Court and the Supreme Court. That the court below considered the federal constitutional problems is indicated in the dissent of Justice Bell in this case, 397 P. 430, 433-34, fn., 156 A 2d 107, 108, fn. 3.

THE QUESTIONS ARE SUBSTANTIAL

The instant case raises serious and substantial questions under the due process clause of the Fourteenth Amendment to the Constitution of the United States with respect to the limitations imposed by that clause upon the confiscatory police power of the states. Although the police-power is one of the least limitable, due process places some limits on its exercise. Cf. *Lambert v. California*, 355 U.S. 225, 228. Further, due process demands from the state fundamental fairness in dealing with private property and in the disposition of litigation in the courts.

Neither gambling, nor unlawful gambling, nor "a device or machine used and employed for gam-

bling" is defined in the law of Pennsylvania. Until the decision of the Pennsylvania Supreme Court in this case, it was clear and settled that the statutory proscription related to the use and employment, and not the nature of the device: "There is nothing in the section which authorizes the seizure and destruction of devices merely on the ground that it would be possible to use them for unlawful gaming." *In re Wigton's Return*, 151 Pa. Super. 337, 343, 30 A. 2d 352, 355. It was, and still is, the law of Pennsylvania that a "free game" does not constitute a thing of value. *In re Wigton's Return*, supra, and the free game feature in this case did not warrant the destruction of the machines here involved. Again, it was the law of Pennsylvania that the presence of a device enabling the cancelling of unused free games does not support a finding that the machines were used for unlawful purposes. *In re Wigton's Return*, supra.

In the instant case, the highest court of the State of Pennsylvania has approved the destruction of the games involved upon the ground that the games *might* or *could* be used for gambling. Admittedly, there is no evidence that these games were actually used for gambling, or even that any evidence of gambling was found on appellant's premises. But the Pennsylvania Supreme Court assumed or was willing to believe that these games would only be used for gambling because it did not think people derived amusement from merely playing them

(and, therefore, they would only play if they were "paid off" for free games).

It is respectfully urged upon this Court that the statute here involved does not tolerate the decision of the Pennsylvania Supreme Court. But this is not mere error of state law.

While an erroneous decision of a state court on matters within its jurisdiction does not deprive appellant of his rights under the federal due process clause, where the error is gross and obvious, indeed arbitrary, such guaranty is violated. See, *Roberts v. New York*, 295 U.S. 264. Here, the determination of the court below is impossible in a rational administration of justice, and is in clear conflict with those fundamental principles which have been established in our jurisprudence for the protection of private rights. See, *American Express Co. v. Kentucky*, 273 U.S. 269; *Corrigan v. Buckley*, 271 U.S. 323; *Wetmore v. Karrick*, 205 U.S. 141; *West v. Louisiana*, 194 U.S. 258. It is submitted that in this case the court below proceeded upon surmise and conjecture, in complete disregard of the evidence in the case. There is not the slightest evidence of unlawful use of the machines involved. On the contrary, there is affirmative evidence that they were used for amusement only. The determination of the courts below that these machines be destroyed rests upon the naive, if not absurd, hypothesis that no one would enjoy playing the games for more than 5c, and therefore

one would play the games only if he were "paid off" on free games! This in the face of positive Commonwealth evidence that even Commonwealth witnesses played the games without expectation of reward, but only for amusement. The determination of the courts below rests upon the broad assertion, which as well applies to almost any amusement device (e.g., playing cards, backgammon boards, etc., *and* the machines approved in *Hilton's Return*, supra), that the games here involved might or could be used for illegal gambling. It is grossly arbitrary to say that these games, which plainly and obviously can be used for pleasure, are illegal *per se* because they also can be used illegally. It is important in this connection to recognize that the courts below did not proceed on the theory, let alone evidence, of which there was none, that games such as those here involved are so much a part of gambling as to warrant the conclusion that they are gambling devices.

The statute involved expressly limits the forfeiture and destruction of property to that "used and employed for the purpose of unlawful gambling." It does not even extend to property intended to be so used.[1] Assuming the decision of the court below to be a proper construction and

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[1] The Pennsylvania legislature was aware of the differences. Section 4604 provides: "Whoever makes, manufactures, or assembles any punch board, drawing card, slot machine, or any machine or device *used or intended to be used for gambling*, is guilty of a misdemeanor . . . ."

application of the statute, then such construction and application makes the statute repugnant to the Fourteenth Amendment to the United States Constitution. To the extent that the class of property condemned consists of that which might or could be used for gambling purposes, such wholesale condemnation is too general and it is arbitrary. It is indefinite, and fails to identify the property subject to destruction. Indeed, men of common intelligence must necessarily guess at its meaning and differ as to its application. One cannot comply with a law so construed and applied, and as so construed and applied it is an unreasonable exercise of the state's police power. Moreover, assuming a statute so applied is effective to prevent the use and permit the destruction of property, due process requires at the minimum that when such application becomes first effective a reasonable time be permitted owners to come into compliance. Here, under the law as construed and applied prior to the decision sought now to be reviewed, the games involved were legal, the standard of the statute being the actual use of and employment for unlawful gambling. If the use of these games is now outlawed because they may be used for gambling, appellant may not be deprived of this property forthwith, since it is only by the decision of the court below in this forfeiture case that he could have learned of the new law. The situation is wholly analogous to the adoption of a statute by a state declaring previously legal prop-

erty illegal; due process requires a reasonable time within which to remove the property, or otherwise deal with it so as to cure the objectionable features, which could easily have been accomplished. On this score, it may be noted that once the seizure was effected, appellant's sole available remedy was to proceed in the forfeiture proceeding. Act of March 31, 1860, P.L. 382, Section 61, 18 P.S. Section 1446.

The issues here involved are of vital importance generally to the proper scope and exercise of police power. They are of vital significance to appellant, whose property is at stake, and who, if it had any reason to suspect that its machines were illegal, could readily have altered them to bring them within *Wigton's Return*. They are important because, as noted by Justice Musmanno, in his dissent, 397 Pa., at 439, 156 A. 2d, at 111:

> "Although the proceedings in this case determine the fate of only 17 machines, the decision will be used throughout Pennsylvania as a death warrant for thousands of other machines, whose value, on a conservative estimate, could easily surpass five million dollars. Should this Court condemn private property so summarily and so ambiguously? Instead of tangling the law in an inextricable thicket of polysyllabic technical nomenclature, should it not specify in words of monkey wrench simplicity just what is or are the gambling features of pin ball machines which doom them to extinction?"

and further (397 Pa., at 445, 156 A. 2d, at 114):

> "The Majority says that the pin ball machines in this litigation are gambling devices but it fails to specify how and why they are gambling devices, which subjects them to execution. The record utterly fails to show that these machines were ever used for gambling.
>
> We thus come to the inevitable conclusion that the Majority has, after a certain amount of technological discussion, arbitrarily condemned them to destruction. I believe that the owners and lessees of similar machines throughout the Commonwealth are entitled to know wherein the machines are illegal and this explanation should be given, in language which will enable them to make such adjustments as will bring the pin ball machines (which are intrinsically harmless) into the realm of legality. The proprietors of five million dollars worth of private property are entitled at least to this. Because the Opinion of this Court does not do this, I must dissent."

Appellant believes that the questions presented by this appeal are substantial and that they are of public importance; that the Pennsylvania statute as construed and applied by the Pennsylvania Supreme Court is repugnant to the due process

clause of the Fourteenth Amendment to the Federal Constitution, and that this Court, therefore, has jurisdiction pursuant to 28 U.S.C. Section 1272(2); and that appellant has also been deprived of his rights under the due process clause of the Fourteenth Amendment by the gross and obvious error of the courts below.

Respectfully submitted,

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